

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IRVIN LYNN HERRON,

Defendant-Appellant.

UNPUBLISHED

April 15, 2014

No. 312484

Wayne Circuit Court

LC No. 12-002679-FH

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of one count of operating while intoxicated causing death, MCL 257.625(4), and one count of reckless driving causing death, MCL 257.626(4). On appeal, defendant is solely contesting the sufficiency of his trial counsel, asserting that she provided him ineffective assistance of counsel. Defendant moved for a new trial, and the lower court held a *Ginther* hearing¹ to resolve that question. Following that hearing, the court denied defendant's motion and found that his counsel did not provide defendant with ineffective assistance of counsel. We affirm.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. [*People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) (citations and quotation marks omitted).]

A finding is clearly erroneous if "the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002).

Defendant's charges arose out of an accident wherein he crashed his motorcycle, which caused the death of his passenger. Medical tests taken close to the time of the accident indicated

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

that defendant had an approximate blood alcohol content (BAC) of 0.191 milliliters per deciliter. Defendant's primary legal strategy at trial involved attempting to prove that the accident was primarily caused by an unidentified third party who sideswiped defendant's motorcycle and caused him to lose control, in order to undermine the element of proximate causation in each charge. He argues on appeal that his counsel's errors constructively prevented him from adequately presenting this defense to the jury. During the *Ginther* hearing, defendant only presented counsel's testimony about her strategic decisions, while plaintiff presented no evidence.

Although defendant is guaranteed the right to counsel under both the United States Constitution, US Const, Am VI, and Michigan Constitution, Const 1963, art 1, § 20, defendant bears a high burden in proving that his trial counsel was so deficient as to functionally deprive defendant of his Sixth Amendment right to effective counsel. *People v Meissner*, 294 Mich App 438, 458-459; 812 NW2d 37 (2011). The crux of this test is to determine whether the mistakes by defendant's counsel effectively deprived defendant of the right to a fair trial. *Id.* The United States Supreme Court has set forth a two-prong test to determine whether counsel was ineffective in a given case. First, defendant must prove that his trial counsel failed to meet an objective standard of reasonableness based on "prevailing professional norms." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). And counsel cannot be deemed ineffective for failing to raise meritless objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Second, defendant must establish prejudice, which is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. At all times, the defendant bears the burden of proving "a reasonable probability that the result would have been different" in the absence of the error. *Wong v Belmontes*, 558 US 15, 27; 130 S Ct 383; 175 L Ed 2d 328 (2009) (quotation marks omitted). When a defendant contends that his or her counsel was ineffective for failing to present crucial evidence on a disputed factual matter, the defendant must present evidence at the *Ginther* hearing to establish the specifics of that absent evidence, so that the court may evaluate the impact of the absent evidence on the outcome of the jury's decision. See *People v Pickens*, 446 Mich 298, 327, 329; 521 NW2d 797 (1994).

Defendant initially contends that counsel was ineffective for failing to retain an expert witness and present testimony from an accident reconstructionist. During the *Ginther* hearing, counsel testified that she consulted with an unidentified expert witness who was an accident reconstructionist that specialized in motorcycle accidents. This expert purportedly would have testified that it was possible for the scene of the accident to show no evidence of a collision with another vehicle even if such occurred. Counsel claimed that she could not retain the expert for trial because defendant's family could not afford the \$2,000 retainer and the \$250 an hour charge for the fee. Counsel reported that she did not petition the court to appoint the expert witness by using public funds because she did not believe, as a retained attorney, that this option was available to defendant. She contended that she would have made the petition if she knew that this option was available to defendant, and that she would have had the expert inspect the motorcycle in order to formulate an opinion. The court found that his counsel was not

ineffective because defendant's argument was based on speculation and because the proposed testimony would have been duplicative to that of plaintiff's expert.

Even assuming that defense counsel should have requested funds for an expert, defendant cannot demonstrate the requisite prejudice to warrant a new trial. He presented no evidence at the *Ginther* hearing to establish what the expert would have testified to at trial. Defendant also implicitly conceded that the expert had not formed an opinion about the crash because he had not yet inspected the motorcycle. Defendant also failed to present any evidence establishing that the court would have appointed the expert witness had counsel so petitioned the court. Defendant's speculative argument clearly fails to meet his burden of proof to establish ineffective assistance of counsel.

Moreover, plaintiff's expert conceded at trial to the facts that defendant contends that his expert would have presented at trial. Plaintiff's crash reconstructionist Kevin Lucidi testified that he did not find any evidence of a collision between defendant and another vehicle before the accident. But he also admitted under cross-examination that it was possible for the crash to have left no evidence of the alleged collision. Thus, the evidence that defendant attempted to present to the court through his own expert would have been cumulative to what Lucidi already conceded. The Supreme Court has implied that the absence of cumulative evidence cannot be a basis for finding prejudice warranting relief from judgment, as "[a]dditional evidence on [previously established] points would have offered an insignificant benefit, if any at all." *Wong*, 558 US at 22-23. Because defendant failed to meet his burden of proof, the court did not err in holding that defendant is not entitled to a new trial due to counsel's failure to petition the court for an expert witness.

Defendant next contends that counsel erred in failing to adequately investigate the case prior to trial. He noted that counsel failed to interview several witnesses prior to trial, specifically the firefighters and police officers who initially responded to the accident. He also noted that counsel failed to interview or obtain a statement from Arthur Scott Rogers (Scott), an eyewitness who was driving with his father, Arthur Thomas Rogers (Thomas), at the time of the accident. Thomas was plaintiff's eyewitness who testified that he saw no other vehicles around defendant's motorcycle when he lost control and crashed. By failing to follow up with her investigator to ensure that these witnesses were interviewed, defendant asserts that counsel was unable to obtain their statements, which potentially could have led to the discovery of exonerating evidence.

During the *Ginther* hearing, counsel conceded that she was unable to obtain Scott's statement before trial, but claimed that she and her investigator left several messages with the witness in attempting to contact him. She also acknowledged that she could not verify whether the investigator ever contacted the firefighters and officers identified in the police report. The court held that defendant was not entitled to a new trial because his argument was again based on pure speculation, as it was unclear what these witnesses would have testified to if called by counsel at trial.

Defendant again fails to demonstrate any prejudice to his case resulting from counsel's actions. The failure to call a witness only qualifies as ineffective assistance if it "deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308.

Moreover, the failure to interview witnesses does not, by itself, establish inadequate preparation warranting a finding of ineffective assistance of counsel. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). To meet his burden of proof, defendant needed to present, at a minimum, the statements of Scott and the other witnesses during the *Ginther* hearing. But defendant did not present these statements during the hearing. Thus, the court correctly concluded that it had no way of determining what these witnesses would have stated if called as witnesses during the trial. It was impossible for the court to measure the prejudice, if any, suffered by defendant. In addition, the firefighters and officers were not eyewitnesses because they were not present at the time of the accident. Accordingly, defendant's speculative argument fails to meet his burden of proving that he lost a substantial defense as a result of counsel's error.

Defendant finally argues that counsel provided ineffective assistance by failing to move *in limine* to exclude evidence from his medical tests following the crash, which established that defendant had marijuana and opiate metabolites in his blood at the time of the crash. He alternatively argues that counsel erred by failing to provide verification evidence to establish that the opiates in defendant's system at the time of the accident were prescribed to him by a hospital. During plaintiff's presentation of its case, Dr. Lokman Sung testified that defendant's urinalysis indicated that he tested positive for opiate and cannabinoids at the time of the crash. But Sung conceded that it was impossible to tell whether defendant was intoxicated from those substances at the time of the accident, as this test merely indicates the presence, not the concentration, of drugs in a person's system. At trial, defendant admitted that he used marijuana the week prior to the accident, but gave no indication as to whether his use was consistent with the Michigan Medical Marihuana Act. He also testified that he was using Tramadol for back pain, as prescribed by his doctor, at the time of the accident. But defendant admitted that this drug never appeared in his drug tests over the years because it was non-narcotic. Thus, defendant's explanation was inadequate to establish why he tested positive for opiates in the medical tests.

Counsel confirmed at the *Ginther* hearing that she made an oral motion during the preliminary exam to exclude the blood test and urinalysis, which included the opiate and cannabinoid evidence, because the tests were not certified. However, she did not move for exclusion of this specific evidence, based on lack of relevance, by a written motion *in limine* because she was attempting to secure a witness who would testify regarding defendant's prescribed drugs. Although the medical reports were admitted as evidence at trial, counsel did not present the one page in the medical reports to the jury that established defendant's prescription for opiates. Counsel also conceded that she should have moved to exclude the evidence about the cannabinoids because it was irrelevant. Although the court acknowledged that the evidence pertaining to defendant's opiate and marijuana use could have been excluded had counsel so moved *in limine*, it held that defendant waived the issue by explaining his remote usage of the drugs during cross-examination, and alternatively held that defendant failed to show the requisite prejudice to warrant a new trial.

Defendant asserts that this evidence is irrelevant and significantly prejudicial, and thus should have been excluded at trial because its only purpose was to prejudice the jury against defendant. MCL 257.625a(6)(a) (emphasis added), a section within the statute criminalizing operating a vehicle while intoxicated, states as follows:

The amount of alcohol or *presence of a controlled substance* or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

See also MCL 257.625a(6)(e). Thus, MCL 257.625a(6)(a) makes all the disputed evidence relevant and admissible against defendant. In enacting MCL 257.625a(6)(a), our Legislature implicitly acknowledged that such evidence is highly probative evidence and should not be excluded by our courts. Further, MCL 257.625(1)(a) makes this evidence relevant because the statute prohibits driving while intoxicated, which in part means "under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance." Thus, even without MCL 257.625a(6)(a), the presence of opiates and cannabinoids in defendant's urine is relevant and probative evidence that defendant was "under the influence of . . . intoxicating substance[s]." Nevertheless, because the medical tests revealed the presence of controlled substances, cannabinoids and opiates (MCL 333.7212 and MCL 333.7214), in defendant's blood at the time of the accident, the evidence was admissible against defendant. Therefore, counsel was not generally ineffective for failing to raise this objection. *Fike*, 228 Mich App at 182. However, conceding that the trial court stated it might have excluded this evidence, we find it necessary to reach the question whether the evidence was otherwise excludable or, if not, whether the admission was prejudicial.

First, defendant also contends that the marijuana evidence was inadmissible because the medical tests only established that defendant's blood contained metabolites, which our Supreme Court previously held did not qualify as controlled substances when determining liability for operating offenses under the Michigan Vehicle Code. Admittedly, our Supreme Court reached this conclusion in *People v Feezel*, 486 Mich 184, 210-212; 783 NW2d 67 (2010), holding that 11-carboxy-THC, a marijuana metabolite, does not qualify as a schedule 1 controlled substance and, therefore, cannot be used to find liability under MCL 257.625. But defendant's argument misrepresents the record. He is simply assuming that the tests indicated only the presence of marijuana metabolites. Sung testified that defendant's medical tests indicated only the presence of cannabinoids in his urine. Sung acknowledged that the tests did not distinguish between active THC and its metabolites. Defendant is simply assuming that the test only indicated the presence of metabolites. Although the medical tests are not in the record, the tests are unnecessary because, according to Sung, they only indicated the presence of cannabinoids. Defendant has not argued that Sung's statement was incorrect. Because defendant failed to establish that the medical tests only reflected the presence of metabolites, he has not established how the evidence failed to indicate the presence of the controlled substance of marijuana.

As to the marijuana evidence generally, defendant suffered no prejudice from the admission of this evidence, because defendant testified to using marijuana on the weekend before the accident. And as addressed below, the prosecutor acknowledged that defendant was not intoxicated from marijuana at the time of the accident. Thus, any potential error did not affect defendant's credibility or allow the jury to conclude that he was under marijuana intoxication at the time of the accident.

Whether counsel provided ineffective assistance by failing to introduce evidence verifying that defendant was prescribed opiates by the hospital is a closer call. Because defendant testified that his Tramadol use would not trigger a positive drug screen for opiates, the absence of evidence verifying his prescriptions for other opiates creates the impression that defendant must be abusing other opiates. Admittedly, counsel claimed that she did not originally intend for defendant to testify, so his admissions may have surprised counsel during trial. But allowing this impression to stand unchallenged could have undermined defendant's credibility with the jury by painting him as a liar whose testimony could not be trusted. The jury could have also concluded that defendant may have been intoxicated on other opiates at the time of the accident. Counsel gave no reasonable explanation for this error; she simply stated that she "wasn't really sure how to get that one page in," even though the entire report from the medical tests was already admitted. According to counsel, that one page would have established that defendant was prescribed morphine from the hospital, thereby explaining the presence of opiates in the medical tests. In failing to raise this objection, counsel failed to meet the prevailing professional norms of the legal profession.

However, any prejudice from counsel's errors appears to be minimal. During opening statements, plaintiff admitted that defendant was not intoxicated due to opiates (or marijuana) at the time of the accident, but rather was intoxicated solely by alcohol. Sung confirmed this by testifying that he could not be certain whether defendant was intoxicated by the opiates at the time of the accident. But Sung presented un rebutted testimony establishing that defendant's BAC was 0.191 at a minimum, which is well over the legal limit of 0.08. MCL 257.625(1)(b). Defendant also conceded that he drank approximately one and a half to two beers, as well as two and a half "shots," before the accident. Because the prosecutor consistently contended that defendant was intoxicated due to alcohol, rather than opiates, it is not reasonably likely that the jury would have reached a different result had counsel submitted evidence verifying defendant's prescription.

Admittedly, defendant may have suffered some prejudice due to the impression that he lied about his use of illicit substances. By so leaving his credibility impaired, counsel could have allowed the jury to conclude that defendant was lying about the presence of another driver who allegedly caused the accident, thus destroying his proximate causation challenge. But it is unlikely that defendant's impaired credibility had any bearing on the outcome of the case. As noted above, plaintiff's eyewitness stated that he did not see any other persons around defendant at the time of the crash. Defendant's eyewitness testimony was significantly impeached when Moser stated that she and Palmiter were stuck in traffic for a few minutes at the time of the accident and, therefore, lacked the opportunity to witness the accident. And the accident reconstructionist testified that he found no evidence that another vehicle collided with defendant's motorcycle before the accident. In light of the strength of this evidence, it does not appear that the error affected the outcome of the proceedings. By failing to present sufficient proof of prejudice, defendant is not entitled to relief from his convictions.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra